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Nos. 847, 854, 855

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL, *Appellants*

v.

DIXIE CARRIERS, INC., ET AL.

UNITED STATES OF AMERICA, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

On Appeal From the United States District Court for the Southern District of Texas

MOTION TO AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 647, 654, 655

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL, *Appellants*

v.

DIXIE CARRIERS, INC., ET AL.

UNITED STATES OF AMERICA, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

INTERSTATE COMMERCE COMMISSION, *Appellant*

v.

DIXIE CARRIERS, INC., ET AL.

On Appeal From the United States District Court for the Southern District of Texas

---

MOTION TO AFFIRM

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellees, Dixie Carriers, Inc., Gulf-Canal Lines, Inc., Mississippi

Valley Barge Line Company, American Barge Line Company, Union Barge Line Corporation, John I. Hay Company, Coyle Lines Incorporated, Federal Barge Lines, Inc., and Waterways Freight Bureau, complainants in the District Court, and Joe D. Hughes, Inc., Hunsaker Trucking Contractor, Inc., Combs Truck Line, Inc., Younger Bros.—J. M. English Truck Lines, Inc., Southwest Oilfield Transportation Co., and Prather Truck Line, Inc., intervening complainants in the District Court, move that the judgment of that Court be affirmed.

This is a direct appeal from the final judgment rendered on August 17, and entered on August 20, 1956, by a specially constituted three-judge District Court convened pursuant to 28 U.S.C. 1253, 1336, 2284 and 2325, which declared invalid, and set aside and enjoined certain orders of the Interstate Commerce Commission entered by the Commission in proceedings identified as Investigation and Suspension Docket No. 6491, and Fourth Section Application No. 31120. Timely notices of appeal were filed by appellants, and two Jurisdictional Statements have been filed, one by the appellant railroads, in No. 647, on December 21, 1956, and one jointly by the United States and the Interstate Commerce Commission in Nos. 654 and 655, on December 27, 1956, pursuant to an order of the District Court entered on December 10, 1956, which extended until that date the time for docketing with the Clerk of this Court. By letter dated December 21, 1956, the Clerk of this Court advised counsel for appellees that it would be satisfactory to file a consolidated motion, directed to all three proceedings, within thirty days after the filing of the last two.

STATUTES INVOLVED

In addition to the statutes enumerated by appellants and reproduced in appendices to their Jurisdictional Statements, appellees respectfully refer the Court to the National Transportation Policy [49 U.S.C., preceding 1, 301, 901, and 1001] and Section 14(1), 14(2), 17(6), 17(8) of the Interstate Commerce Act [49 U.S.C. 14(1), 14(2), 17(6) and 17(8)], reproduced in Appendix A, hereto attached.

STATEMENT OF THE CASE

The issues as set forth in the Jurisdictional Statements fall into two distinct groups—those dealing with the action of the District Court with respect to the Commission's order in its Investigation and Suspension proceeding, and those dealing with its action with respect to the Commission's order in its Fourth Section proceeding, and will be considered separately herein.

While the two proceedings had to do with the same rates, they were separate and distinct, arose under different sections of the statute, involved different issues, and were handled under different procedures. The Suspension case arose primarily under section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7), see pages 25-26 of Appendix J to Jurisdictional Statement in Nos. 654, 655]. The Fourth Section case arose primarily under section 4(1) of that Act [49 U.S.C. 4(1), see page 23 of that Appendix].

Neither Jurisdictional Statement raises any question with reference to the applicability of section 17(8) of the Interstate Commerce Act to the Commission's order granting authority to depart from the prohibi-

tion of section 4(1), or whether appellees were and are entitled to have that order stayed pending proper action by the Commission on petitions for reconsideration thereof. Appellees submit, as explained in more detail hereinafter, that such point is completely dispositive of this proceeding, without regard to the merits or demerits of the contentions of the appellants on the questions which they have raised.

THE ORDERS IN QUESTION

Appellants in Nos. 654, 655, have reproduced as Appendices to their Jurisdictional Statement, certain orders and corrected orders of the Commission, and a minute of action by the Fourth Section Board. A full understanding of the procedural progress of these matters in the Commission requires also that the actual dates of the various actions be noted. As Appendix B, hereto there is presented a chronology of the various orders of the Commission, showing the development of this litigation, and the present posture of the proceedings before the Commission. Those "orders" as reproduced by the appellants, some of which will be discussed more in detail hereinafter, require some elaboration at this point for complete clarity.

Their Appendix A—is titled "Second Corrected Order" in the Suspension case, suspending the rates. This was served on November 8, 1955, and was intended, as was the First Corrected Order in that proceeding, to modify the designation of one of the schedules being suspended. Comparison of the corrected order with the original (Item 1 of Note of Evidence No. 2 presented to the District Court) indicates a typographical error in the omission of several words

from the second paragraph of the recitations. In the original that paragraph read as follows (bracketed words are those omitted in corrected order):

> "*And it further appearing,* That upon consideration of the said schedules and protests thereto there is reason to believe that they would, if permitted to become effective, result in rates and charges, rules, regulations or practices which would be unjust and unreasonable in violation of the Interstate Commerce Act and constitute unfair and destructive competitive practices in contravention of [the National Transporation Policy and be in contravention of] the provisions of section 4 of the Interstate Commerce Act, without appropriate authority, and good cause appearing therefor:".

Their Appendix D—Is a minute of the Commission's Fourth Section Board, which never was framed as an order, and was not served upon the parties nor released to the public.

Their Appendix E—Order vacating the suspension effective December 17, 1955, dated December 7, 1955, was served on December 13, 1955.

Their Appendix F—"Corrected" order vacating the suspension, dated December 7, 1955 was not served until March 2, 1956, after these appellees had filed their complaint in the District Court. This restates in the negative the reasons set forth in the "corrected" suspension order, even to following the apparent typographical error.[1]

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[1] Railroad appellants in No. 647 raised a question, (numbered 8) in their Notice of Appeal filed with the District Court, whether the Interstate Commerce Commission has the power to correct an order after the validity of the original order has been challenged by court action. That refers, of course, to the "corrected" order

Their Appendix G—"Corrected" Fourth Section Order granting relief from the prohibition of Section 4(1) of the Interstate Commerce Act, responsive to Fourth Section Application No. 31120, effective December 17, 1955. The original order was entered December 9, 1955, appellees and other interested protestants were informally advised of its issuance on December 12, 1955, and the order was served December 29, 1955. That original order bore the notation, "By the Commission, Fourth Section Board", although headed as is the "corrected" order. The "correction" made by the corrected order, served March 2, 1956 (after suit had been filed) was to substitute "By the Commission, Division 2, acting as an Appellate Division."

Their Appendix H—Order denying petitions of appellees and others for reconsideration of the order

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of December 7, 1955, in I. & S. Docket No. 6491 (Appendix F to Jurisdictional Statement in Nos. 654, 655), served March 2, 1956, in which the Commission replaced the "and good cause appearing therefor" which bottomed the original, with a restatement in the negative of the reasons which it had given, pursuant to statutory requirement, for the suspension—even to negating the statement that the r es would be in contravention of section 4(1)—an obvious absurdity in view of the pending Fourth Section Application. The appellants in Nos. 654, 655 do not raise that question, and the railroad appellants do not appear to press it in their Jurisdictional Statement. We assume that it may be considered dropped [Rule 15(c)(1)]. In any event, the District Court was obviously correct in holding that this "was not a permissible *nunc pro tunc* order correcting clerical, ministerial errors or omissions." As that Court noted, "It was an attempt to substitute reasons where none had appeared or been recorded." The District Court further cited with approval, *Long Island Railroad Company* v. *United States*, 140 F. Supp. 823, 828, that in the face of positive, strong findings of probable illegality merely to restate the conclusion in negative form is inadequate.

(Appendix E) vacating the Suspension order, dated and served December 16, 1955.

Their Appendix I—Order of the Commission, by Division 2, acting as an appellate division, denying petitions of appellees and others for reconsideration of the order granting fourth section relief. Although dated December 16, 1955, this order was not served until April 27, 1956, after Answers of the United States, the Commission, and the intervening railroads had been filed in the District Court proceeding, and the minute of Division 2 action purportedly on December 16, 1955, upon which it is stated to have been based was not entered until April 30, 1956.

ISSUES RELATING TO THE COMMISSION'S INVESTIGATION AND SUSPENSION PROCEEDING

The first three questions, as stated by both groups of appellants, are practically identical, and relate solely to the action of the District Court in invalidating the order of the Commission by which it vacated that part of a previous order which had suspended the operation of certain rail rate tariffs. As stated by appellants in Nos. 654, 655, those questions are:

1. "Whether the Commission's order vacating the suspension is subject to judicial review."

2. "Whether Section 8 of the Administrative Procedure Act required the Commission to make findings in support of its order vacating the suspension."

3. "Whether the District Court erred in enjoining the operation of the rate schedules after they had gone into effect and prior to a final decision on their lawfulness by the Commission."

Practically identical questions, arising from facts and circumstances also practically identical to those here (so far as concerns the "Suspension" aspect of this case), are presently before the Court in No. 244, this Term, *United States of America and Interstate Commerce Commission* v. *Amarillo-Borger Express, Inc., et al* (138 F. Supp. 411; probable jurisdiction noted, 352 U.S. 817, 1 L. ed. 2d 44 and appellants' briefs were filed January 22, 1957), where they are stated in almost the same words.

It should be noted that both in the Suspension aspect of this proceeding and in No. 244 [Amarillo-Borger] the cases have long since become moot by reason of the operation of the seven months time limit set by section 15(7) of the Interstate Commerce Act [49 U.S.C. 15(7)] upon the Commission's power to suspend. The rates at issue in the latter proceeding went into effect by operation of the statute many months ago, without regard to the validity of the Commission's order vacating the suspension. The same is true here with respect to the Suspension case. Consequently, except as a matter of principle, the appellees in all of these proceedings have no further interest and nothing material to gain through affirmance nor to lose through reversal—which probably explains the absence of any resistance to the appeal in No. 224.

So far as that principle is concerned, the matter now is before the Court in that proceeding, and we may assume that it will be settled there. Evidently the United States and the Interstate Commerce Commission take the same view, as at page 7 of their Jurisdictional Statement in Nos. 654, 655, they merely refer to the status of No. 244 and refrain from further dis-

cussion of those questions. Despite the present posture of the identical questions in that case, however, we feel that we should point out to the Court the more evident fallacies in the reasoning set forth in the contentions of the railroad appellants in No. 647.

They would treat the decision of the District Court as an invasion of the Commission's discretionary and exclusive power to suspend a rate. They cite numerous decisions which support that power, and refer to the large number of suspension matters handled by the Commission during the course of a year. The fact is that the decision of the District Court in no way impinges upon the power to suspend, nor does it require that suspension proceedings of the Commission be cloaked with any greater degree of formality than at present. All that it does is to require that once a rate has been suspended by an order which sets forth, as required by section 15(7), a statement of the reasons for such suspension, a subsequent order vacating that suspension must similarly contain a statement of the reasons upon which it is predicated. Certainly nothing could be more in accord with ordinary principles of orderly procedure.

This Court has held that the provisions of the Administrative Procedure Act [5 U.S.C. 1001, et seq.] are applicable to Interstate Commerce Commission proceedings. *Riss & Co., Inc.* v. *United States, et al,* 341 U.S. 907, 95 L. ed. 1345—*Per Curiam,* citing *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 94 L. ed. 616. See also *Coyle Lines, et al* v. *United States, et al,* 115 F. Supp. 272 (275); *Chicago & E. I. R. Co.* v. *United States, et al,* 107 F. Supp. 118, 124.

The appellants appear to concede, as they must, that the provisions of that Act are applicable gen-

erally to proceedings under section 15(7) of the Interstate Commerce Act, but contend that after a schedule has been suspended and an investigation has been instituted upon the required statement of the reasons therefor, and the matter has been assigned for the hearing required by statute, the Commission is free to act on the rates and put them into effect without regard to the provisions of the Administrative Procedure Act [5 U.S.C. 1007(b)] requiring that "All decisions (including initial, recommended, or tentative decisions) shall * * * include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record * * *". In other words, that the Commission may void a vital portion of its previous order without even a statement of the reasons therefor, much less a conclusion of the investigation which it has instituted.

Appellants contend that an order vacating a suspension order and permitting to become effective rates on which the Commission has previously found there exists grave doubt of legality, is not a "final" order, and that the courts are powerless to protect competitors who are immediately, adversely and financially affected thereby.

Administrative action is *final* "when at no future time will its impact on the petitioner become more conclusive, definite, or substantial." [See footnote No. 4 to concurring opinion of Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 155; 95 L.ed. 817, 844 (1951).] Certainly where, as here, the order of the Commission permitted to become effective a great number of drastically reduced rail rates, admittedly aimed at their competi-

tors, which had been previously suspended for valid and forceful reasons, and timely petitions by these competitors for reconsideration had been denied, the order had reached *finality*. The fact that Commission was to conduct an investigation of the rates, which might at some future date result in their elimination or modification, in no way lessened their immediate and irreparably adverse impact upon appellees. At no future time in that or any other proceeding before the Commission could the appellees have tested the sufficiency of the Commission's order vacating its previous order of suspension. They had completely exhausted their "administrative remedy", and there was no avenue by which they could proceed in protection against irreparable injury flowing from what they considered an insufficient and therefore illegal order of the Commission other than through the judicial review provided by statute.

Even if it be considered that the scheduled investigation of the rates there in question cast some doubt upon the procedural finality of the order which vacated their previous suspension, it was none the less final so far as its effect upon appellees was concerned. As Mr. Justice Frankfurter states in his concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath, supra,* 156, " 'Finality' is not, however, a principle inflexibly applied. If the ultimate impact of the challenged action on the petitioner is sufficiently probable and not too distant, and if the procedure by which that ultimate action may be questioned is too onerous or hazardous, 'standing' is given to challenge the action at a preliminary stage." [Citing *Terrace* v. *Thompson,* 263 U.S. 197, 68 L.ed. 255, 44 S. Ct. 15; *Santa Fe Pac. R. Co.* v. *Lane,* 244 U.S. 492, 61 L.ed.

1275, 37 S. Ct. 714; and referring to *Waite* v. *Macy*, 246 U.S. 606, 62 L.ed. 892, 38 S. Ct. 395.]

Thus, in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (1953), and in *Pacific Inland Tariff Bureau* v. *United States*, 129 F. Supp. 472, 134 F. Supp. 210 (1955), three-judge District Courts enjoined the enforcement of Commission orders even where pending petitions before the Commission seeking reconsideration thereof had not yet been passed upon, and the orders admittedly were not *procedurally final*.

ISSUES RELATING TO THE COMMISSION'S FOURTH SECTION CASE

It is at this point that the questions presented in this proceeding depart from those already before the Court in *Amarillo-Borger* (No. 224). The rates which were here proposed by the rail carriers ran counter to the provisions of section 4(1) of the Interstate Commerce Act [49 U.S.C. 4(1)] in that they would have provided for lower charges to more distant points than to intermediate points. That is a competitive weapon of devastating power which the Congress has prohibited; giving the Commission the power to grant relief from the otherwise rigid prohibition only in "special cases, after investigation."

It was necessary, therefore, that there be a valid grant of such extraordinary authority before the rates in question could be lawful. Application for such authority was made by the railroads, and protests were filed on behalf of appellees, among others. The order granting such authority was held invalid by the District Court, as a result of which the rates are no longer in effect. Thus, this aspect of the proceeding is far from moot and the appellees have a very real and com-

pelling interest in the matter, as otherwise the rates at issue would have been in effect throughout the period of complex and prolonged litigation before the Commission (see Appendix B).

Appellees submit that the District Court's action on that order of the Commission clearly is correct and that there is no occasion for further review by this Court.

The first question presented by the appellants on this aspect of the proceeding, [No. 4 in each Jurisdictional Statement], is whether the Commission is required to hold a hearing before granting temporary relief from the long-and-short-haul provision of Section 4(1) of the Interstate Commerce Act. We respectfully submit that no such question is presented. As to it, the District Court specifically stated, "But this is a point we need not decide." The "holding" attributed to it by appellants in Nos. 654, 655, at page 7 of their Jurisdictional Statement, that "the statute thus clearly implied that the question [whether such relief should be granted] shall be determined upon testimony and after a hearing" actually was only a quotation from the decision in *Louisville & N.R. Co.* v. *United States,* 225 Fed. 571, affd. 245 U.S. 463, 62 L. ed. 400. That is recognized by appellants in No. 647, who further point out that the question here discussed was not decided in that case. Yet appellants would now have this Court rule upon what they state is dictum from another decision handed down more than forty years ago.

We feel that a good case could be made for the necessity of such a hearing,[2] but we did not urge it

[2] In footnote No. 7 of their Jurisdictional Statement, appellees in Nos. 654, 655 refer to the Commission's rules recognizing need for

even before the District Court. What we did there urge was that the Commission may not grant temporary fourth-section relief prior to an investigation which it has instituted, in which it has determined that a hearing must be held, and to which a Hearing Examiner has been assigned to conduct such hearing and prepare appropriate recommendations. That was the situation here.

We submit that there exists here no substantial question.

The second question presented by the appellants on this aspect of the proceeding [No. 5 in both Jurisdictional statements[3]] is whether the Interstate Commerce Commission is required to make findings to support an order granting temporary relief from the prohibitions of Section 4(1) of the Interstate Commerce Act.

The very words of the statute itself indicate that the answer to that question must be in the affirmative. The statute requires that the Commission find a "special case", and that it must also find the proposed charges to be "reasonably compensatory for the service performed." In the absence of a finding of a "special case" the Commission lacks jurisdiction. In the absence of a finding that the charge will be "reasonably

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expeditious informal proceedings on Section 4 applications. It also should be noted that in Rule XVIII of the Commission's Rules of Practice under the hearing "Applications under the Fourth Section", it is stated in paragraph (f), "It is the uniform practice of the Commission to hold hearings upon the request of any interested party." [Vol. 8 Interstate Commerce Acts, Annotated, p. 6267.]

[3] —and inferentially raised in question No. 7 of the railroads in No. 647—not repeated by the appellants in Nos. 654, 655.

compensatory" it is specifically forbidden to grant the extraordinary authority. A power under which an administrative body may permit an applicant to depart from a prohibition of the statute, must be administered with careful regard for the limitations which the Congress has placed upon that power.

Even if it were held that the provisions of the Administrative Procedure Act [5 U.S.C. 1001, et seq., discussed *supra*, page 9] were not applicable to the "investigation" required by the statute to be conducted by the Commission before it may grant relief from the prohibition of section 4(1), it is clear that the provisions of section 14(1) and (2) of the Interstate Commerce Act [49 U.S.C. 14(1) and (2), Appendix A hereto] are applicable. Those provisions of the statute require that the Commission shall make a report in writing in respect to every investigation made by it, "which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises * * *", and that reports of investigations made by the Commission "shall be entered of record, and a copy thereof shall be furnished [to the parties]". Certainly that requires something more than a bald grant of authority to depart from the terms of the statute, unaccompanied by even a shred of reasoning to support such grant, or any indication that the required "investigation" has been made—as in this instance it obviously had not.

As this Court noted in *Alabama Great Southern R. Co., et al* v. *United States, et al.*, 340 U.S. 216, 227, 228, 95 L.ed. 225, 237, while section 14(1) of the Interstate Commerce Act [49 U.S.C. 14(1)] does not require that the Commission make detailed findings of fact except in a case where damages are awarded, it does not re-

lieve the Commission of the duty to make the "basic" or "quaisi-jurisdictional" findings essential to the statutory validity of an order. Citing *Florida* v. *United States,* 282 U.S. 194, 215, 75 L.ed. 291, 304; and *United States* v. *Baltimore & O. R. Co.,* 293 U.S. 454, 464, 465, 79 L. ed. 587, 594, 595.

The third question presented by the appellants on this aspect of the proceeding [No. 6 in both Jurisdictional Statements] is whether an order of the Interstate Commerce Commission under section 4(1) of the Interstate Commerce Act [49 U.S.C. 4(1)] is subject to judicial review, particularly at the suit of competing carriers. In evaluating the merit of the appellants' position on this question, it is important to note that authority to maintain drastically reduced rates to distant competitive points, while at the same time maintaining much higher rates on the same commodities to intermediate points, is a competitive weapon of devastating power, and that competitors whose traffic is the subject of such rate making have a very real and immediate interest in proceedings in which proposals to depart from the terms of the statute are at issue.

In support of their position all of the appellants rely primarily upon the opinion by Justice Brandeis in *United States of America, et al.* v. *Merchants and Manufacturers Traffic Association of Sacramento, et al.,* 242 U.S. 178, 61 L.ed. 233 (1916). The question which the Court there had before it bears no resemblance to the issues here. There communities and shippers who challenged the order of the Commission in the Court were not parties to the lengthy and involved proceedings before the Commission, but petitioned for "rehearing" after the Commission had

issued its decision. Such petition having been denied, they brought suit contending that the orders of the Commission were made without their "having their day in court or without giving them an opportunity to show the unreasonableness thereof * * *" (184). On appeal from a decision which cancelled and set aside certain portions of the orders of the Commission, this Court held, in effect, that the complaining communities were not necessary parties to the Commission proceeding. This is a far cry from the situation of these appellees, who were and are vigorous protestants in the proceedings before the Commission, who were and are directly and vitally concerned with the issues there presented,[4] and who would suffer irreparable injury by reason of the action of the railroads taken pursuant to the Commission's authorization of departure from the requirements of the statute.

The Commission itself has long recognized the direct and vital interest of competitive carriers in proceedings on railroad applications for relief from the prohibition

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[4] The other cases cited by appellants add no strength to their contention. All were controlled by factors not here present. In *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, the Court found that the plaintiffs had not clearly shown that they suffered any injury by nature of the orders (492-3) and that in any event they had an avenue for redress by way of reparation (496). In *Atchison, Topeka and Santa Fe Ry.* v. *United States*, 130 F. Supp. 76, the complaint failed to allege that the plaintiffs had suffered or been threatened with any damage or financial injury (78). In *Pittsburgh and W. Va. Ry. Co.* v. *United States*, 281 U.S. 479, 486, 76 L. Ed. 979, the Court held that appellant was not entitled "to institute an independent suit * * * in the absence of resulting actual or threatened legal injury to it." The comments in *New York Dock Ry.* v. *Pennsylvania R. Co.*, 62 F. 2d 1010, and *Tennessee Electric Power Co.* v. *Tennessee Valley Authority*, 306 U.S. 118, 83 L. Ed. 543, to which appellants evidently allude, had to do with competition *otherwise lawful*.

of section 4(1). In *Transcontinental Cases of 1922*, 74 I.C.C. 48, the Commission gave careful consideration to section 4(1) as amended by the Transportation Act of 1920; particularly noted that it was then required to accord due observance to section 500 of that Act (49 U.S.C. 142) which declared the policy of Congress to be "to promote, encourage, and develop water transportation, service, and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation"; and concluded (71) that in the administration of section 4(1) as amended, after a "special case" had been found the proposed rates were to be judged by four criteria, two of which directly relate to the interests of competing water carriers: that they "be no lower than necessary to meet existing competition", and that they be "not so low as to threaten the extinction of legitimate competition by water carriers".

If anything, the National Transportation Policy enacted as a part of the Transportation Act of 1940 (Appendix A hereto) in clearer and much more forceful language requires recognition of the interests of competitive carriers in such matters, declaring it to be the policy of Congress to "provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each * * * without * * * unfair or destructive competitive practices * * *"; and specifically requiring that all of the provisions of the Interstate Commerce Act be administered and enforced with a view to carrying out that declaration of policy.

The universal recognition of the interest and standing of competitive carriers in proceedings under Sec-

tion 4(1) is emphasized by the fact that the application of the rail carriers in FSA 31120 (Item No. 1 of Note of Evidence No. 1 filed in the District Court) carries a Certificate of Service showing that it was served upon various of these appellees.

We submit that the contention of the appellants that appellees had no standing to maintain this proceeding in the District Court is completely without merit.

THE DISPOSITIVE POINT IGNORED BY THE APPELLANTS

None of the appellants raises any question with respect to that phase of the decision of the District Court which is fully and finally dispositive of the primary issue here raised in this proceeding—whether the order granting relief from the prohibition of section 4(1) was valid. By not raising any question regarding it, either in their respective Notices of Appeal or in their Jurisdictional Statements, appellants apparently have accepted as correct the conclusion of the District Court that the action of Division 2 in granting such relief [see Appendix G, Jurisdictional Statement in Nos. 654, 655, and our discussion thereof, *supra*, page 6] was not an appellate, but an *initial* action.[5] Therefore

[5] The District Court stated the facts in its footnote No. 6, 143 F. Supp. 849 [page 26, Appendix B, Jurisdictional Statement, No. 647], as follows: "No Order of any kind was ever entered or served in FSA 31120 until the Order of December 9, 1955. While an undisclosed Minute Entry of the Fourth Section Board, 21 October 1955, states, 'Voted to withhold relief pending hearing, and to assign the above application for hearing with I & S, No. 6491', it is of no consequence as no action was, or could then have been, taken and to be effective, it must have been communicated to in-

under the clear provisions of section 17(8) of the Interstate Commerce Act [49 U.S.C. 17(8); quoted in Appendix A hereto], timely petitions for reconsideration thereof having been filed by appellees and others, they were entitled to a stay, as a matter of specific statutory commandment, pending disposition of the matter by the Commission.

The entering by Division 2, months later, of a predated order, predicated upon a predated minute, and containing recitations not in accord with the available facts,[6] cannot operate to deprive parties of their statu-

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terested parties affected by it, 49 USCA 14(1)(2), 17(5); 5 USCA 1002, which was not done.

"The Railroads' Petition FSA 31120 itself reflects this: 'As the Suspension Board suspended the involved rates, the question of issuing Fourth Section authority at this time became moot and the Fourth Section board has *neither granted nor denied* the Railroads' application. However, as a petition for vacation of the order of suspension is filed concurrently, the question is *revived* and this petition is therefore filed • • • '. (Emphasis supplied)

"The Prayer stated: 'Wherefore these applicants pray that this Commission issue appropriate Fourth Section authority sought by Fourth Section Application No. ICC 31120': and compare this with the document filed simultaneously in I & S 6491, denominated a 'Petition • • • for Reconsideration' and opens, 'Come now the railroads in • • • I & S 6491 and petition this Honorable Commission for reconsideration of the Order of the Suspension Board • • • '". (Emphasis supplied)

[6] The District Court stated [143 F. Supp. 844, 854; page 36, Appendix B, Jurisdictional Statement in No. 647]: "But since Division 2 could act only as an appellate division on a matter *appealed* to it for reconsideration, the Commission then entered, on April 27, 1956, a still further corrected order of Division 16 stating, contrary to available record facts (note 6 supra) that Division 2 was 'acting as an appellate division, upon consideration of a petition by respondents (Railroads) requesting that the action of the Fourth Section Board in voting to withhold relief in Fourth Section Application No. 31120 • • • be reversed • • • '

"The action of Division 2 was not appellate. It was initial.

tory right to have their petitions for reconsideration of an initial action by a Division considered and passed upon by the Commission, nor of their statutory right to a stay of the order pending such disposition.

That circumstance, standing alone, was and is enough to require that the order purporting to grant an exception from the prohibition of section 4(1) be declared invalid, be set aside, and its enforcement be restrained and enjoined. The findings and conclusions of the District Court on this aspect of the case stand unchallenged by the appellants (Rule 15(c)(1) of the Revised Rules of the Supreme Court).

Without valid relief from the prohibition of section 4(1) the rates contained in the schedules in question were unlawful, and could not be maintained. Therefore, without regard to the merits or demerits of the contentions of the appellants on the various other questions raised, and we submit that none have merit, the end result must be the same so far as this proceeding is concerned, and the Judgment of the District Court must be affirmed.

Pending decision on the petition for reconsideration of that action of December 9, the protestants were entitled to a stay. An order entered months after the judicial review has been set in motion and based on recitations not borne out by the available record and does not change it."

CONCLUSION

WHEREFORE, the appellees respectfully submit that the appellants have presented no substantial question for the decision of this Court, and that the opinion and decree of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees

January 25, 1957

Proof of Service

I, Donald Macleay, one of the attorneys for the appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 24th day of January, 1957, I served copies of the foregoing Motion to Affirm on the several parties to the case as follows:

(1) On the United States of America by mailing copies in duly addressed envelopes with first class postage prepaid, to J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.; and Victor R. Hansen, Assistant Attorney General, Department of Justice, Washington 25 D. C.

(2) On the Interstate Commerce Commission by mailing copies in duly addressed envelopes with first class postage prepaid to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, Washington 25, D. C., and to H. Neil Garson, Assistant General Counsel, Interstate Commerce Commission, Washington 25, D. C.

(3) On the Atchison, Topeka & Santa Fe Railway Company et al., railroad appellants, by mailing copies in duly addressed envelopes with air mail postage prepaid to their attorneys of record, Robert H. Bierma, 652 Union Station, Chicago 6, Illinois; Richard J. Murphy, 1225 La Salle Street Station, 139 West Van Buren Street, Chicago 5, Illinois; and Harvey Huston, 1211 Railway Exchange, 80 East Jackson Boulevard, Chicago 4, Illinois.

DONALD MACLEAY

APPENDIX A

(Statutes involved in addition to those cited by appellants.)

NATIONAL TRANSPORTATION POLICY, 49 U.S.C., preceding 1, 301, 901 and 1001:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

INTERSTATE COMMERCE ACT, Sec. 14(1) (49 U.S.C. Section 14(1)):

> That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in

case damages are awarded such report shall include the findings of fact on which the award is made.

INTERSTATE COMMERCE ACT, Section 14(2) (49 U.S.C. Section 14(2)):

All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

INTERSTATE COMMERCE ACT, Section 17(6) (49 U.S.C. Section 17(6)):

After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or board shall have become the order of the Commission as provided in paragraph (5), any party thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish. Any such application, if the decision, order, or requirement was made by the Commission, shall be considered and acted upon by the Commission. If the decision, order, or requirement was made by a division, an individual Commissioner, or a board, such application shall be considered and acted upon by the Commission or referred to an appropriate appellate division for consideration and action. Rehearing, reargument, or reconsideration may be granted if sufficient reason therefor be made to appear; but the Commission may, from time to time, make or amend general rules or orders establishing limitations upon the right to apply

for rehearing, reargument, or reconsideration of a decision, order, or requirement of the Commission or of a division so as to confine such right to proceedings, or classes of proceedings, involving issues of general transportation importance. Notwithstanding the foregoing provisions of this paragraph, any application for rehearing, reargument, or reconsideration of the matter assigned or referred to an individual Commissioner or a board, under the provisions of paragraph (2), if such application shall have been filed within twenty days after the recommended order in the proceeding shall have become the order of the Commission as provided in paragraph (5), and if such matter shall not have been reconsidered or reheard as provided in such paragraph, shall be referred to an appropriate appellate division of the Commission and such division shall reconsider the matter either upon the same record or after a further hearing.

INTERSTATE COMMERCE ACT, Section 17(8) (49 U.S.C. Section 17(8)):

Where application for rehearing, reargument, or reconsideration of a decision, order, or requirement of a division, an individual Commissioner, or board is made in accordance with the provisions of this section and the rules and regulations of the Commission, and the decision, order, or requirement has not yet become effective, the decision, order, or requirement shall be stayed or postponed pending disposition of the matter by the Commission or appellate division; but otherwise the making of such an application shall not excuse any person from complying with or obeying the decision, order, or requirement, or operate to stay or postpone the enforcement thereof, without the special order of the Commission.

APPENDIX B

Chronology

(Including actions and developments since the record was made in the District Court.)

September 19, 1955—Fourth Section Application No. 31120 filed. Railroad rate schedules filed, effective October 26, 1955.

(Various Protests and Petitions for Suspension, and Relies thereto, seasonably filed.)

October 21, 1955—Order of Board of Suspension, dated October 20, 1955, suspending the rate schedules in I. and S. Docket No. 6491, served.

(Corrected Orders, modifying specification of suspended schedules, served November 1 and 8, 1955.)

(Petition for Reconsideration of order of Board of Suspension of October 20, 1955, in I. & S. Docket No. 6491, and "Petition for Issuance of Fourth Section Relief", and replies thereto, seasonably filed.)

November 25, 1955—Both proceedings assigned for hearing at Houston, Texas, on January 24, 1956, before a Hearing Examiner.

December 7, 1955—Order of Division 2, vacating suspension, dated December 7, 1955, effective December 17, 1955, served December 13, 1955.

December 9, 1955—Order granting fourth section relief, effective December 17, 1955. Protestants were informally advised thereof on December 12; the order actually was served on December 29, 1955.

December 14-16, 1955—Petitions for reconsideration of order dated December 7, vacating suspensions of schedules, and Petitions for reconsideration of order dated December 9, granting fourth section relief, filed.

December 16, 1955—Notice dated December 15, to the effect that the petitions in I. & S. Docket No. 6491 seeking reconsideration and stay of the order vacating the suspension of schedules would not be entertained by Entire Commission, served.

December 16, 1955—Notice dated December 16 to the effect that the petitions in I. & S. Docket No. 6491 seeking reconsideration and stay of the order vacating the suspension of schedules were denied, served.

December 16, 1955—Order of Division 2, in I. & S. Docket No. 6491, dated December 16, 1955, denying petitions for reconsideration and stay, served.

December 17, 1955—Schedules became effective.

January 24, 1956—Hearing in both proceedings commenced at Houston, Texas. It adjourned on January 27, to reconvene at Washington, D. C. on March 5, 1956.

(Complaint and Intervening Complaint filed with District Court—CA 9544—and plaintiffs' Memorandum Brief filed.)

March 2, 1956—"Corrected Order" dated December 7, 1955, vacating suspension in I. & S. 6491, served.

March 2, 1956—"Corrected Order" dated December 9, 1955, granting fourth section relief, served.

March 5, 1956—Hearing in both proceedings resumed at Washington, D. C. Concluded on March 9, 1956.

(Answer of United States and interventions and answers of Interstate Commerce Commission and railroads, filed with District Court.)

April 27, 1956—Order of Division 2, dated December 16, 1955, referring to both I. & S. Docket No. 6491 and F.S.A. 31120, and denying petitions for reconsideration and stay of order of December 9, 1955, in the latter, granting fourth section relief, served.

(Briefs filed and case heard by District Court in C.A. 9544.)

May 24, 1956—Briefs filed with Interstate Commerce Commission in both proceedings.

(Opinion of District Court in C.A. 9544, on August 1, 1955—finding both the order vacating the suspension in I. & S. No. 6491 and the order granting fourth section relief pursuant to F.S.A. 31120 invalid.)

August 6, 1956—By petition of that date, railroad applicants in F.S.A. 31120 requested the Entire Commission to grant "temporary fourth section relief pending final determination by the Commission of the issues embraced herein and in related proceedings." Replies thereto were seasonably filed. There has been no action by the Commission on that petition.

(Judgment entered by the District Court in C.A. 9544, on August 17, 1955—declaring both orders invalid, setting them aside, and restraining and enjoining their enforcement.)

August 27, 1956—The railroads filed a supplement, effective August 29, 1956, under special permission of the Commission, placing the schedules back under suspension, and reestablishing the basis of rates as it had existed prior to December 17, 1955.

October 31, 1956—Proposed report of the Hearing Examiner served. It recommends that the rates at issue be found not shown to be just and reasonable, that the schedules be ordered cancelled, and that fourth section relief be denied.

December 26, 1956—Exceptions of railroads and others to the Examiner's proposed report filed. (Due date extended from November 30, 1956, at request of railroads.

January 15, 1956—Replies to exceptions filed on behalf of appellees and others.